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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE OHIO STATE LIFE INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

RAY A. CLARK, ET AL.,

Respondents.

REPLY BRIEF OF PETITIONERS

WILLIAM S. EVATT,
ROBERT L. BARTON,
Attorneys for Petitioners,
50 West Broad St., Columbus 15, Ohio.

Of Counsel:
WILLIAM R. CHADEAYNE,
BRICKER, EVATT, BARTON, ECKLER & NIEHOFF.
DONALD J. HOSKINS,
Vice President and General Counsel of The Columbus Mutual Life Insurance Company.
(Other Counsel on Inside Cover)

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, 15, Ohio

WEBER, RAUH & FORMBY,
EDWARD B. RAUH, JR.,
WILLIAM A. WEBER,
Merchants Bank Bldg.,
Indianapolis 4, Indiana,

KRUPPER, WEBER, RICHARDS, MILLER & ROBERTS,
WILLIAM H. KRUPPER,
RICHARD L. MILLER,
150 East Broad Street,
Columbus 15, Ohio,
Attorneys for Respondents,

MARK MCELROY,
Attorney General,
State House,
Columbus 15, Ohio,
Attorney for Superintendent of Insurance.

INDEX

Questions presented 1
Argument 4
Respondents' points B and C, that Article V precludes the stockholders from relieving their stock of restrictions with respect to future and as yet unearned profits 4
Respondents' point D 5
Respondents' point E, that "the proposed amendment" would deprive policyholders of vested rights 6
Conclusion 7

Cases Cited

Geiger v. Seeding Mach. Co., 124 O. S. 222 4
Huber v. Martin, 127 Wisc. 412 6

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QUESTIONS PRESENTED

Respondents have misstated on page 3 of their brief what they term to be the immediate questions presented to the court. It is therein stated that the questions presented to this court by the petition for writ of certiorari is whether or not the proposed amendment to Article V of the charter of The Columbus Mutual Life Insurance Company (hereinafter referred to as "Columbus Mutual") may be legally adopted by the stockholders of this stock life insurance company. Petitioners clearly stated and emphasized to this court that they do not seek a review of the lower court's determination that under the present provisions of Article V, the participating or mutual plan policyholders of Columbus Mutual possess a vested bene-

ficial interest in the company's entire existing surplus, and all of the existing profits reflected in its voluntary reserves. The sole point upon which a review is sought by this court is the judgment of the District Court, affirmed by the Court of Appeals, enjoining these stockholders from adopting any amendment to Article V which would affect the participating policyholders' "vested right of contract in and to the company's *future* and as yet unearned surplus and profits". The entire petition is directed solely to this single point. Obviously, since the proposed amendment before the court dealt solely with the surplus of the company, it could not now be lawfully adopted, because the Court of Appeals held that respondents not only have a vested beneficial interest in the entire surplus, but also in the profits represented by voluntary reserves.

There is no basis whatever for the contention of respondents that the stockholders of Columbus Mutual intend "to deprive Columbus Mutual's policyholders of its surplus", or that the stockholders of Columbus Mutual are trying to deprive the existing policyholders of all their rights to the existing surplus so that it would belong to the policyholders. The decision of the lower courts in so far as it holds that these policyholders not only own beneficially the entire existing surplus, but also the existing profits represented by voluntary reserves, is not sought to be reviewed by this petition.

It is the injunction of the courts below preventing the stockholders of Columbus Mutual from ever relieving their stock of its present restrictions as to *future and as yet unearned profits*, which presents an extremely farreaching question of corporate law. In petitioning this court to rule upon this question and this question only, petitioners are not, as alleged by respondents, asking this court to rule "in a vacuum" or to "render an advisory opinion".

The single issue raised by this petition should not be obscured by arguing about the proposed amendment or who owns the existing surplus and existing profits represented by voluntary reserves. Those points have been decided, and this court is not asked by petitioners to review them.

This court is asked to review the vital principles of corporate and constitutional law upon which the lower court's injunction against the stockholders of Columbus Mutual must necessarily stand.

ARGUMENT

In view of the foregoing statement, it is only necessary to comment briefly upon Points B, C, D and E of respondents' argument.

Respondents' Points B and C, That Article V Precludes the Stockholders from Relieving their Stock of Restrictions with Respect to Future and as yet Unearned Profits.

Respondents place great emphasis upon the fact that each stock certificate of Columbus Mutual bears on its face the statement that it is issued and accepted subject to the terms and conditions of the Articles of Incorporation to which reference is made. The answer to this argument is that under Ohio law, as held by the Supreme Court of Ohio, every stock certificate issued by every corporation is a contract between the corporation and the holders of stock certificates and every stockholder by becoming such, consents to the terms and conditions of the Articles of Incorporation. In the case of *Geiger v. Seiding Mach. Co.*, 124 O. S., 222, syllabus No. 3 (which states the law of the case) reads as follows:

> "3. A stock certificate issued by a corporation is a contract between the corporation and the holders of certificates of all classes of stock. By subscription to stock of any class, the subscriber consents to conditions of the articles of incorporation and becomes a party to the contracts of each class."

The legend appearing on each stock certificate of Columbus Mutual is but declarative of the law of Ohio. There is no contract here against purely prospective amendments of the charter, nor could there be under the Ohio constitutional reserved power to amend.

Respondents' Point D.

In stating what the lower courts held in this case (page 17 of their brief), respondents failed to set forth the one holding sought to be reviewed, to-wit, that these policyholders have a vested contractual right to future profits as yet unearned. Only on page 19 of respondent's brief is comment made upon the question of vested beneficial ownership of future profits. Here the theory is advanced that most, if not all, of future profits will come from the aggregate over-charges of premiums against these policyholders, and that therefore, any amendment which would appropriate such contingent future profits to the unrestricted use of the stockholders would not be "entirely prospective in operation".

Resopndents seem to take it for granted that the level rate premiums which they must pay on their policies will inevitably in the future create additional profits; a purely speculative assumption. Premiums on existing policies, as well as those upon policies hereafter written may or may not create profits in the future, depending upon continuing efficiency of management (something in which these policyholders have no voice). Contingent future profits also depend upon economic conditions, epidemics, and innumerable other unforeseen events which might affect longevity. Respondents have cited no single authority for the proposition that participating policyholders of a stock life insurance company have a vested contractual beneficial interest in future and as yet unearned profits derived from the conduct of the business. If they have, as pointed out in our petition, every law of every state authorizing the conversion of a purely mutual insurance company into a stock company is unconstitutional.

If, as respondents contend, policyholders may be said to have a vested contractual interest in their premiums which they pay under the terms of their policies, such rights would be contractual policy rights arising out of their contracts of insurance. As recognized by the Court of Appeals in its decision, every insurance policy of every policyholder of Columbus Mutual contains an express provision that the policy constitutes the entire contract between the company and the policyholder. No policy ever issued by Columbus Mutual has ever contained any reference to the charter or to Article V. The court below held that the policyholder rights to the surplus and profits are not acquired under policy provisions but under the charter. For respondents now to argue that policyholder rights in future profits arise out of premiums which they contracted to pay under their policies, is to admit that such rights arise under their policies instead of the charter. If future rights to future unearned profits arise out of the contracts of insurance set forth in their policies, they do not exist, because the policies, which contain the entire contract, make no mention of the charter.

Respondents' Point E, that "The Proposed Amendment" Would Deprive Policyholders of Vested Rights.

Here again respondents are avoiding the sole point raised by this petition by arguing about the proposed amendment. Respondents cite and discuss at some length what they call "the land-mark case" of *Huber v. Martin*, 127 Wisc. 412. That case involved a mutual company whose policyholders were its only members. They objected, and rightly so, to an attempt to convert the company to a stock company under an ineptly drawn state statute which, in that instance, was being employed to further a scheme of conversion whereby the policyholders who owned the com-

pany would have wound up with approximately 10% of the stock of the new company and the other 90% of the stock would have been given principally to the promoters of the scheme and to ex-policyholders who were no longer members of the company. This case has no bearing whatsoever upon the right of stockholders of Columbus Mutual to amend their charter prospectively with respect to future and as yet unearned profits.

CONCLUSION

In conclusion, we submit that although these petitioners feel that the lower courts erred in conferring beneficial ownership upon respondents of the entire existing surplus and profits of Columbus Mutual upon its participating policyholders, they are not asking this court to review such decision.

Petitioners do respectfully ask this court to review the judgment of the court below only to the extent that it holds that Columbus Mutual has by Article V of its charter contracted with its participating policyholders so as forever to vest in such policyholders third party contractual rights in future contingent and as yet unearned profits: rights which may never be changed by amendment notwithstanding the Ohio constitutionally reserved power to amend.

This surplus and profits of some $19,000,000.00 was accumulated over the half century of Columbus Mutual's operations by judicious management elected by the stockholders; it grew not only from profit on premiums but from wise investment as well. It did not accure only from premiums paid by present policyholders, but also from premiums paid on thousands of policies long since matured.

All these millions now belonw to these present policyholders, and the stockholders ask no review of this grant.

In the name of justice, are these stockholders not entitled to a review of the decision which goes beyond all this and prohibits them from ever changing their financial structure as to future and unearned profits?

We submit that the petition should be granted.

Respectfully submitted,

WILLIAM S. EVATT,
ROBERT L. BARTON,
Attorneys for Petitioners,
50 West Broad St., Columbus 15, Ohio.

Of Counsel:
WILLIAM R. CHADEAYNE,
BRICKER, EVATT, BARTON, ECKLER & NIEHOFF.

DONALD J. HOSKINS,
Vice President and General Counsel of The Columbus Mutual Life Insurance Company.